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No.'s ..... and .....

IN THE

Supreme Court of the United States

October Term, 1981

CHARLES D. MOELLER, and LOWELL POWELL,

Petitioners,

VS.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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Question Presented

Does the Due Process Clause of the Fourteenth Amendment require state courts to entertain interlocutory appeal from denial of a defendant's motion to disqualify the prosecutor when the defendant's right to a fair trial has been tainted by the prosecutor's on-the-record statements manifesting conflict of interest and personal bias?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Petitioners Charles D. Moeller and Lowell Powell respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut. That judgment held not appealable, prior to trial, a denial of motions to disqualify the prosecutor based upon conflict of interest and personal bias manifest on the record.

Opinions Below

The judgment and opinion of the Supreme Court of Connecticut, one Justice concurring, was issued on March 30, 1982, and is reported at 186 Conn. 547, reproduced as Appendix "A." The unreported trial court opinion denying petitioner-defendants' motions to disqualify the prosecutorial authority, dated October 29, 1980, is reproduced as Appendix "B."

Statement of Jurisdiction

The decision of the Supreme Court of Connecticut was rendered on March 30, 1982. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

Constitutional Provision Involved

U.S. Const., Amend. XIV:

"... No state shall ... deprive any person of life, liberty, or property, without due process of law ...".

Statement of Facts

In May, 1977, petitioner-defendants Moeller and Powell were charged by the State of Connecticut with conspiring to commit arson regarding a March, 1975 industrial fire. Powell brought a federal lawsuit against State's Attorney Donald A. Browne and two law enforcement officers in the United States District Court in January, 1980.

Powell's lawsuit, pursuant to 42 United States Code §1983, seeks damages of $500,000, and alleges that Browne acted outside and in addition to his quasi-judicial role as prosecutor engaged in discretionary conduct immunized by law; that he acted further as an administrator of the law enforcement officers and as an investigator who actually prepared the affidavit signed by the ostensible affiant which identical affidavit was used to produce all the arrests in the instant consolidated criminal case.[1] Additionally, Powell's suit alleges a material distortion in the preparation of said affidavit and that Browne knew or should have

[1] A third co-defendant has not moved to disqualify the prosecuting authority.

known that one David Bubar, whose autumn, 1976 statements are the linchpin of said bench warrant affidavit, partially renounced and refused to sign "statements" to the law enforcement officers which renunciation was never inquired into through the witness nor made known to the Court issuing the bench warrants. (Bench warrant Affidavit reproduced as Appendix "C.")

The information about Bubar's refusal to sign his statements and his concomitant disavowal of partial contents thereof came to the attention of Powell's counsel in December, 1979. Thus, shortly before the expiration of the applicable statute of limitations as to any action by Powell[1] his suit was filed in January, 1980.[2]

On May 5, 1980, the prosecutor's conflict of interest and personal bias arising from his status as a defendant in Powell's federal action were made manifest when, in urging a June rather than an August or September trial date, he referred directly to his having been sued, and stated:

> . . . I'm entitled to some consideration as far as getting this matter resolved as well. I think the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me. I've been sued for a half a million dollars, and I think it's a matter, if your Honor please, that I'm entitled to an expeditious disposition of that particular case. I don't want to go on the record and make a personal argument to your Honor, but I think that as far as I'm concerned, this is weightier than the

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[1] *See, Williams* v. *Walsh*, 558 F.2d 667 (2d Cir. 1977).

[2] The suit remains pending. A motion to dismiss, filed on behalf of all defendants therein, was denied without prejudice, and the discovery sought by plaintiff Powell has been stayed pending trial of the instant matter.

> request for a continuance for vacations and teaching at seminars and things of that nature. I think it's more important for me to get that civil matter resolved than it is to have counsel go and instruct seminars somewhere or take a vacation. I put that to your Honor's consideration.

Transcript reproduced as Appendix "D," at p. 39a.

This expression of personal concern was noted by defense counsel who suggested that such a feeling might require disqualification. After this comment, Browne made the following remark: "Again, my personal situation is not, I'm not asking your Honor to really give that any consideration. I'm just trying to tell your Honor my position." *Id.* at p. 41a.

The bench warrant affidavit makes abundantly clear that any bias creating the danger of an unfair trial for petitioner Powell logically necessitates that said bias first or simultaneously prejudice petitioner Moeller; the bench warrant demonstrates that Powell's guilt (the result to be protected against if unfairly achieved) cannot logically be pronounced without the foundation pronouncement of Moeller's guilt. Only Moeller is alleged to have motive and to have been the moving force behind the conspiracy.

Reasons for Granting the Petition

The criminal justice system should not be required to first await a tainted conviction and suffer the interim opprobrium occasioned by a conflicted, biased prosecutor failing or appearing to fail to administer a fair trial due to personal motivation.

Because prejudice should not need to be shown in this area, and because further evidence regarding the conflict

and bias as motivating forces would be driven underground by the very existence of the conflict and the motion to disqualify, there is no need to await a judgment on the merits.

The question of the appealability of the denial of a motion to disqualify in a criminal case was specifically left open by this Court in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 372 n.8 (1981).

I.

Interlocutory Review Is Here Consistent With Traditional Civil Guidelines and Required by Criminal Due Process Under the 14th Amendment.

Pursuant to 28 United States Code § 1257, this Court has jurisdiction by writ of certiorari over "[f]inal judgments or decrees rendered by the highest court of a State in which decision could be had. . . ." This section and its federal system counterpart, 28 United States Code § 1291, most often permit appellate review only from a judgment that finally disposes of an action on the merits. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

This "final judgment" rule is traditionally given a practical rather than technical construction. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Cohen*, the Court recognized that certain "collateral orders" which do not terminate an action on the merits are, nevertheless, "final" judgments for appellate jurisdictional purposes. The doctrine allows review of orders that "finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546.

This "collateral order" rule as regards decisions on motions to disqualify had led a checkered history[4] until *Firestone Tire and Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), which held non-appealable a denial of disqualification, and which summarized the *Cohen* test as follows: "... '[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' *Id.* at 375 (quoting *Coopers & Lybrand, supra*, at 468).

Denial of a civil disqualification motion satisfies the first prong of the collateral order test. "It conclusively determines the disputed question because the only issue is whether challenged counsel will be permitted to continue his representation." *Firestone, supra*, at 375-76. This is equally so in this criminal case. Even the thrust of the concern raised by *Firestone's* concurring opinion (Rehnquist, J.) regarding the appropriateness and possibility of judicial monitoring through the trial does not affect detrimentally petitioners' claim here. The prosecutor's statement that "... the disposition of this criminal case is going to have a very heavy bearing on the disposition of the civil case which has been pending against me," shows from thence forward the existence and inexorable continuation of prejudice. Thus, it is futile to await "a later point in the proceedings—'When prejudice can be better gauged.'" *Firestone, supra*, at 381 (quoting *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978).

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[4] *See, e.g.*, recent Second Circuit treatment in *Harmar Drive-In Theatre, Inc.* v. *Warner Bros. Pictures*, 239 F.2d 555 (2d Cir. 1956), (orders denying and granting disqualification appealable); *Fleischer* v. *Phillips*, 264 F.2d 515 (2d Cir. 1959), (orders denying disqualification not appealable); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974), (returning to rule of *Harmar, supra*); *Armstrong* v. *McAlpin*, 625 F.2d 433 (2d Cir. 1980), (returning to rule of *Fleischer, supra*, at least in a civil suit).

As to *Cohen's* second prong, the *Firestone* Court assumed without deciding "an important issue completely separate from the merits of the action." *Firestone, supra,* at 376. Despite *Firestone's* appropriately strict "assumption without deciding" the "completely separate" issue, it is of course properly to be deemed so where a case requires decision of the question. For example:

> The question whether counsel should be disqualified is a legal issue distinct and separate from the underlying . . . issues involved in this case. It is not so enmeshed in the factual and legal issues, . . . nor of such a nature as to permit fair assessment only after trial as to militate against review at this time.

In re Coordinated Pre Trial Proceedings, Etc., 658 F.2d 1355, 1357 (9th Cir. 1981). The disqualification ruling is clearly collateral to guilt or innocence, thus falling into that "small class . . . too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen,* 337 U.S. at 546.

The third prong of *Cohen's* collateral order test requires that the interlocutory order be "*effectively* unreviewable on appeal from a final judgment." *Firestone, supra,* at 376. (Emphasis added). *Firestone* held that civil orders denying disqualification failed to satisfy this requirement.

An order is "effectively unreviewable" where it involves "an asserted right, the legal and practical value of which would be destroyed if it were not vindicated before trial." *Id.* at 377 (quoting *MacDonald, supra,* at 860). This Court has also cautioned, however, that there exists a "core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge,* 424 U.S. 319, 331, n.11

(1976). This principle is particularly applicable where petitioners run the risk of being deprived of liberty, rather than property interests as in *Mathews, supra*, by governmental decisions in the prosecutorial-criminal justice framework. In *Firestone*, the "effectively unreviewable—irreparable harm" claim failed for lack of a "single concrete example of the indelible stamp or taint of which [petitioner] warn[ed]." 449 U.S. at 376.

This petition presents a concrete case of "irreparable harm," and one of constitutional dimension. A prosecutor has myriad duties requiring delicate balance in judgment and discretion; it would be unfair to petitioners and, indeed, to the prosecutor as well, to expect the requisite impartiality from one who is, by his own admission, so personally drawn in. Among the countless duties and decisions totally within the prosecutor's internal decision-making processes, subject to review only if later discovered, are the responsibilities: to lay before the Court all evidence tending to aid in ascertaining the truth, even if such information is inconsistent with the contention of the prosecution;[5] to disclose exculpatory information;[6] to disclose advantages or power held by the government over a witness;[7] to make arrangements and/or disclose any arrangements so made with government witnesses;[8] to correct government witnesses who lie;[9] to make sentence recommendations.[10] Once one adds to the list of pertinent factors

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[5] *Namet* v. *United States*, 373 U.S. 179 (1963).

[6] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

[7] *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Alcorta* v. *Texas*, 355 U.S. 28 (1957).

[8] *Giglio* v. *United States*, 405 U.S. 150 (1972).

[9] *Napue* v. *Illinois*, 360 U.S. 264 (1959).

[10] *Santobello* v. *New York*, 404 U.S. 262 (1971).

the prospect of the prosecutor's management of plea negotiations so critical to the criminal justice system,[11] it is readily seen that the question here meets the *Cohen* requirement that the issue be "too important to be denied review," *Cohen, supra,* at 546, resulting in "irreparable harm" because the order will have become "effectively unreviewable." *Firestone, supra,* at 376.

It can hardly be gainsaid that these crucial decision-making powers are unlikely to be utilized fairly here (or appear to be), either because of prosecutorial self-interest, vindictiveness or the appearance of either.

Finally, as noted, the *Firestone—Cohen* tests require that the question presented be "effectively unreviewable" upon traditional appeal, *Firestone, supra,* at 376, or implicate a right which "will have been lost, probably irreparably," if review is deferred until after trial. *Cohen, supra,* at 546. *Firestone* did not involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Firestone, supra,* at 377 (quoting *United States* v. *MacDonald, supra,* at 860). In so noting, *Firestone* stated:

> [t]he propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is *normally* only after final judgment. The decision whether to disqualify an attorney . . . will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

Firestone, supra, at 377. (Emphasis added).

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[11] *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978); *Santobello* v. *New York, supra.*

The conflict—manifest bias question here, however, is, as alluded to *supra*, effectively beyond subsequent more informed review. This is so because of the low visibility that normally attends the earlier noted internal prosecutorial decisions, strategies, actions, or omissions. These decisions and actions will be driven underground, or appear to be, rendering futile any prospect of subsequent discernment.[12]

II.

Interlocutory Review Is Also Appropriate in Order to Avoid Taint to the Entire Criminal Justice System and Its Appearance of Fairness.

In addition to the "irreparable harm" that will befall *petitioners* if appeal must await a judgment on the merits, the taint resulting from the prosecutorial bias severely damages the entire judicial system and its appearance of fairness. Thus distinctions should be drawn concerning motions to disqualify in criminal as opposed to civil litigation.

In *Berger* v. *United States*, 295 U.S. 78 (1935), the Court addressed prosecutorial responsibility:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore,

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[12] *See, e.g., People* v. *Zimmer*, 51 N.Y.2d 390, 434 N.Y.S.2d 206, 414 N.E.2d 705 (1980), ("the practical impossibility of establishing that the conflict has worked to the defendant's disadvantage."); *Pisa* v. *Commonwealth*, 378 Mass. 724, 393 N.E.2d 386 (1979), ("The formation of the record itself might be affected by decisions influenced by the conflict.").

> in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. at 88.

The requirement of impartiality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' (citation omitted), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Thus, while it is true that, assuming a conviction, petitioners can raise the question after trial on the merits, this forced delay will extend the damaging effects of a biased prosecutor far beyond petitioners alone. As this Court has stated, "justice must satisfy the *appearance* of justice," *id.* at 243, to avoid the likely provocation of public suspicion and distrust of the judicial system that would result with a biased prosecutor. To allow this prosecutorial authority, whose conflict and bias is already manifest on the record, to continue participation in this case would dilute the public's faith and confidence in the judicial system. Clearly, then, society's interest in a fair prosecution of the criminal law is an interest "which would be destroyed if it were not vindicated before trial." *MacDonald, supra,* at 860. Here, the threat to the integrity of the judicial system is not merely speculative as in *Firestone.*

It may be argued that appealability would "open the floodgates" to pre-trial appeals. It is the obligation of the judicial system generally, and the prosecutorial authority specifically, to provide a fair, impartial and thorough analysis of matters before it. Bypassing or delaying vindication of such fundamental judicial principles as an accused's

right to a fair trial by an unbiased prosecutor, partially in the name of efficiency, does not serve that purpose.

CONCLUSION

The facts of this case do not rest upon conflict of interest alone. Thus the prospective ruling sought may be restricted to situations where, additionally, *bias* is manifest on the record. A decision herein, limited to the facts of clear conflict and bias as manifested on this record, will guide prosecutions of the future, protect an accused's rights and make appeals unnecessary.

For the foregoing reasons, petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioners

Certificate of Service

This is to certify that three (3) copies of the foregoing Petition For Writ of Certiorari were mailed, postage prepaid, on this 25th day of June, 1982 to Counsel for Respondent, State of Connecticut: Donald A. Browne, Esquire, State's Attorney, 1061 Main Street, Bridgeport, Connecticut.

/s/ THOMAS L. NADEAU

THOMAS L. NADEAU